

# **The Basel Convention of 1989**

– **A developing country's perspective**

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### **Executive Summary**

This paper sought to examine whether

- The functioning of the Convention is consistent with practices of such multi-lateral fora
- the actions pursuant to the Convention agreements have worked towards its objectives
- the measures and actions of the Convention are consistent with the principles of free trade and economic development, as practiced under the World Trade Organization (WTO)
- whether the Convention has worked towards a secular development of environment related practices and technologies amongst its member countries

### **Findings**

This paper argues that the Convention has been found short on all four points bulleted above.

The Convention, contrary to most multi-lateral for a, is still identifying the subject matter of its agreement approximately 12 years after its formation. It has in the meanwhile instituted unilateral measures affecting trade, even while the subject matter of the Convention is being finalized. This is, in fact, quite the opposite of origins of the WTO. When the WTO came into force in 1994, it was at the end of several rounds of discussions through its predecessor, GATT. Measures under the WTO regime were the result of trade agreements on clearly identified products and subject matter that member countries committed themselves to, in a manner that left little scope for dispute.

The membership of the Convention clearly has discriminatory rights amongst different categories of members. There are no clear criteria laid out that enable different categories of members to have the same rights under the Convention.

The Convention’s measures have worked counter to its stated objectives. Convention measures will contribute to the increased usage of primary raw materials that are hazardous, create unviable financial conditions for promoting waste recovery and disposal and, in the case of developing countries, create greater conditions of poverty that in turn will lead to poorer environmental management practices.

The measures used under the Convention include trade bans and restrictions. This is against the principles of the WTO or indeed the principles of free trade. Further, it has enacted measures that will create exclusive clubs of trade, particularly amongst the developed world. Simultaneously it has created circumstances that are inherently discriminatory against developing countries.

The trade bans as proposed under the Convention are violative of the “most favoured nation” status accorded to all members of the WTO in that it discriminates trade based on country of origin. Further, it violates the spirit of Article XX of GATT that permits special measures in individual countries on grounds of environment, health and public safety, in that it tries to enforce regimes on areas outside the sovereignty of countries imposing such bans. It also seeks to determine the manner of production rather than regulate through tariffs only, another violation of the principles established under the WTO.

Further, the manner in which such bans and anti-trade measures have been imposed have been contrary to practices of such multi-lateral forums and through minority action. It is possible for a small minority of members to enforce trade regimes on the entire international community. The Basel Ban in fact would require votes from less than 30% of the Basel membership to become law. This manner of functioning, under pressure from non-governmental groups including Greenpeace, lends itself to political machinations. Further it increases the role of such non-governmental groups who have no accountability for their actions either to national governments, or worse, the people they seek to help in the developing world. This is a dangerous trend and precedent.

The manner in which the Convention has sought to effect its bans etc is in complete violation of the sovereign rights of nations to chose their approach. It is also dismissive of domestic legal and regulatory regimes that govern environment and health.

The paper will argue that the Convention seeks to interfere and dismiss the process of economic development and its accompanying favourable impact on health and environment in favour of command and control measures.

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### **The Origins of The Basel Convention**

The Basel Convention of 1989 was in response to a series of incidents involving dumping of hazardous wastes in developing countries in Africa and Asia. The hazardous wastes originated in developed countries and were transported, in some cases, under false representation.

The Convention aims to do the following<sup>1</sup>:

1. Reduce transboundary movements of hazardous waste to a minimum
2. Ensure that hazardous wastes should be treated and disposed of as close as possible to their source of generation
3. Minimize hazardous waste generation at source.

The preamble clearly communicates the desire of the parties to the Convention to introduce restrictions and bans on trade “Recognizing also the desire for the prohibition of transboundary movements of hazardous wastes and their disposal in other states, especially developing countries”<sup>2</sup>.

The Convention, created under the UN Environment Programme, works through three levels<sup>3</sup>:

- The technical and working committees that discuss the specific subject matter of multi-lateral agreements of the Convention
- A Secretariat that coordinates the work of the Convention
- The Conference of Parties –(similar to the Ministerial conference of the WTO)

*The Basel Convention came into existence as a response to misrepresented and fraudulent export of hazardous wastes to developing countries, for which laws already existed.*

The Convention has 148 parties to the Convention, as of August 2, 2001<sup>4</sup>. Countries that ratified the Convention are referred to as “Parties”. The European Union qualifies as one party to the Convention. Members are entitled to one vote

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Trade – The Basel Convention’s Impact on International Commerce”, Competitive Enterprise Institute, Environmental Studies Programme, October 1996 ISSN#1085-9047

<sup>2</sup> Basel Convention document, “Preamble” as adopted by the Conference of Plenipotentiaries on 22 March, 1989 and in force effective 5 May, 1992.

<sup>3</sup> Fifth Annual World Bank Conference on Environmentally and Socially Sustainable Development, 1997 – Conference paper on “International Agreements”

<sup>4</sup> The Basel Convention Secretariat or [www.basel.int/ratif/ratif.html](http://www.basel.int/ratif/ratif.html)

each EU members either voting individually or as EU (one vote for the latter). A notable non-party to the Convention is the USA.

The Convention came into force in 1992. Since then, there have been three significant milestones that have received differing support through ratification.

1. The original Convention document that broadly sought to regulate hazardous waste movements between countries. This document has 148 parties, as stated above.
2. The **Basel Ban** (as it is popularly referred to) through amendments to the original Convention. This bans trade of hazardous waste between a sub-set of Parties, who have ratified the ban, and those who have not ratified the ban or are not members of the Convention. 62 parties participated at the meeting that proposed the ban. 26 of these parties have ratified the ban. When 46 parties or 2/3<sup>rd</sup> of those present at this meeting ratify the ban, the ban will come into force as an international agreement. The ban is not yet in force though some countries, notably the EU countries, are attempting to enforce the ban already.
3. The **Basel Protocol** that spells out liability and compensation for damages caused by accidental spills of hazardous waste during import, export or during disposal. 13 Parties have ratified the Basel Protocol.

The Convention document comprises of a Preamble that lists the objectives of the Convention, 29 Articles that form the subject matter of the documents and 8 Annexes. The Annexes to the document contain the specific subject matter of agreements reached by the Convention. Briefly the Annexes cover the following subject matter:

- I - defines categories of waste to be controlled by the convention
- II - categories of wastes requiring special consideration
- III - List of Hazardous Characteristics
- IV - List what constitutes disposal operations for “waste” (Part A) and “recovery” ( Part B)
- V - Lists out the procedure of Prior Informed Consent and trade in permitted wastes including specific documentary information
- VI - Spells out the Arbitration Procedure in case of disputes between Convention signatories
- VII - Which came into existence following Decision III/I amendment adopted in 1995, is still not in force pending ratification of 2/3<sup>rd</sup> of the members who were are the meeting. This list contains the list of countries that have supported an international trade ban on movement of hazardous wastes with countries that are not part of Annex VII. This primarily constitutes the EU countries and notably excludes the USA.
- VIII - Categorizes hazardous waste that will be the subject of trade ban
- IX - Categorizes hazardous waste that may be excluded for a complete trade ban.

A more recent development, as a result of amendments effected in 1995 and 1997 is the distinction between members of the Convention. Those countries listed under Annex VII to the Convention (“Annex VII” members), that include primarily the OECD/EU countries, are permitted different trading rules to non-Annex VII members. Annex VII members are allowed to trade in hazardous waste. Trade between Annex

VII and non-Annex VII members is not allowed even in wastes that are inputs for recycling.

While effecting these amendments, transparent and non-discriminating criteria for admission to Annex VII membership have not been specified.

### **Highlights of measures proposed under the Convention**

The list of items that will enter Annex VIII and IX are still being debated between Convention members through the Technical Working Group that has been assigned the task.

Up to 1995, the Convention regulated hazardous waste movements through a system of recording trade and “Prior Informed Consent” amongst parties to the Convention. (This the reflected in Annexure V and VI to the Convention that governs trade procedures and arbitration.) This was an extension of the 1984 adoption of the Cairo Guidelines on management and disposal of hazardous wastes. The initial Convention (of 1989) did not seek to impose a ban, but closely regulate and monitor such trade. The Convention also wanted to grant members their individual and sovereign right to ban import or export of such cargo.

*The Basel Convention has sought to ban trade between developed countries listed in Annexure VII and other countries through amendments passed in 1995 and 1997, when less than half of the original Convention signatories have been participant to these decisions.*

In 1995, the Convention decided to ban all hazardous waste trade for disposal from OECD countries, the European Union and Liechtenstein (Annexure VIII wastes). As of 1997, this ban extended to all hazardous wastes including those intended for reuse or recycling (now Annexure IX wastes). The amendment has yet to come into force, as it does not have the necessary ratification of 2/3<sup>rd</sup> of the Parties. Such ratification would have to be supported where necessary by amendments to the local laws of member

countries. Notable opponents of a complete ban include Australia.

Notwithstanding any or all bans imposed by the Convention, there is a provision through Article 4 of the convention that parties may enter into bilateral, multilateral or regional agreements regarding transboundary movements of hazardous waste or other wastes provided such agreements do not violate environmentally safe practices as required by the Convention.

### **The Functioning of the Convention**

The principle of contract / agreement and enforceability of such agreements is a clear understanding of the subject matter of the agreement. Twelve years after the Convention has come into effect there is still active discussion under the Technical Working Group, constituted for the purpose, as to what constitutes the subject matter of the convention, viz., hazardous waste. This is in complete contrast to the trade

agreements in the WTO that specify the goods and products that form part of the agreement. In trade in goods, individual country commitments are specified in terms of the International Harmonised Code that is used as the basis of trade monitoring and duty levy in all countries.

The chief points of disagreement have been:

*The Basel Convention is still seeking to define the specific subject matter that constitutes hazardous waste, 9 years after the Convention has come into force and about 4 years after some of its members have sought to effect trade bans!*

### **What constitutes waste?**

Commodities or items that are purchased by a contracting party imply a further economic value. Hence, scrap metal and metal wastes constitute inputs for production in several countries, notably developing countries. Ships headed for scrapping provide metal for steel

recycling. Waste would imply no further economic value of the item in question and hence no one would pay to buy it. The waste producer would have to “pay” to dispose off the waste.

The lists being compiled through Annexure VIII and Annexure IX to the Convention represent the first steps towards such classification. The classification to these Annex is still a matter of strong debate within members.

### **What constitutes hazardous products?**

Early definitions of the Convention referred to properties, elements etc that render a substance hazardous. Ships destined for disposal have been classified as hazardous waste. An expert committee in India<sup>5</sup>, working under instructions from the Supreme Court, discovered that about 1% of a ship’s physical constituents comprise hazardous substances as per existing definitions of the Convention. Similarly, there are several products and by-products that contain varying degrees of toxic or “hazardous” substances that are not inherently hazardous wastes.

The result of these various disagreements has been the constitution of a Technical Working Group that has been trying to categorize hazardous waste. Such products are further being classified into two categories, broadly under Annexure VIII and Annexure IX of the Convention.

Annexure VIII products would be subject to a complete ban in terms of transboundary movements while Annexure IX would be regulated trade of hazardous waste that serve as inputs to production or recycling. Countries like India and China that have significant industry that operates on recycling of “waste” products have been strongly debating classification to these two Annex.

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<sup>5</sup> Report of the High Powered Committee on Management of Hazardous Wastes, pursuant to writ petition No: 657/95, Supreme Court of India, Research Foundation for Science, Technology and Natural Resource Policy vs Union of India and others, Page 83

*The Convention violates accepted functioning of multi-lateral trade forums like the WTO is its discriminatory rules amongst its members, and trade measures that are incompatible with the “most favoured nation” principles of the WTO. Given differing memberships to the two forums, there exists potential for serious conflicts with the more widely accepted WTO.*

**The Convention has not reached a consensus on the specific subject matter of the agreement!**

The Basel Convention through its successive amendments adopted over the years has created three categories of countries: Annexure VII members, non-Annexure VII members and non-parties to the Convention. Different trade rules on hazardous waste apply to each category of country. There are no defined criteria that admit non-Annexure VII members to Annexure VII. This is clearly in violation of the spirit of any multi-lateral agreements.

**Discriminatory rules differentiate members.** This is contrary to the spirit of the WTO or indeed any other multi-lateral forum on such matters.

Despite the lack of a clear “most favoured nation” status (as it operates at the WTO), the Convention seeks to impose non-tariff based trade barriers including trade bans. The membership of the Convention and the WTO do not coincide. All Convention members are not WTO members. Similarly, all WTO members are not Convention members.

**The case for the conflict between agreements sought to be enforced by the Convention and those the WTO has effected has been recognized by the Convention.**<sup>6</sup> The convention urges settlement of disputes through mutual dialogue and a specified arbitration procedure. However, it has not so far addressed the fact that the WTO has been a more comprehensive and widely accepted multi-lateral framework on trade.

*The Basel Convention makes it possible for a minority of countries to ratify and impose measures that will affect the entire global community. The Basel Ban needs 42 ratifications (or 28% of the Convention membership!!) to become a law enforceable on the entire world!*

In contrast, the more recent amendments and measures of the Convention have not yet been ratified by a majority of its own members (less than half). The functioning of the Convention, as reflected in the ban proposition, is that 42 countries through ratification of the Basel Ban can impose the ban on the 148 parties to the convention. A majority of the 26 countries that have already ratified the ban are EU countries. In a system of multi-lateral forums many poorer developing countries do not have adequate funds to support their presence and participation in multi-lateral forums. Such poorer countries can become easy recruitment by

developed countries for casting votes in favour of measures such as bans. The Convention can thus, as in the case of the Basel Ban proposals, effect international legal regimes through minority voting! This is clearly undemocratic in practice and spirit.

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<sup>6</sup> Page 43 of COM/ENV/TD(97)41/Final distributed in May 1998 prior to COP-4 of the Convention.

## Violation of the spirit of Article XX of GATT

*Through its unilateral measure of trade ban between Annexure VII (developed) countries and others, the Convention violates the spirit of article XX of GATT that permits “non-discriminatory” measures in a host country but opposes discrimination based on country of origin or on the manner of production of goods.*

Article XX of GATT permits countries to have trade restrictions “necessary to protect human, animal or plant life or health”. This clause in GATT would seem to legitimize the Basel Convention and its trade ban, or indeed several other multilateral agreements on environment. Such agreements include the Montreal Protocol (1987) that bans products using CFCs, the Convention on International Trade in Endangered Species (1973). However, no country has yet brought any conflict with the WTO principles on trade with these treaties to

the WTO.

However, the spirit of the WTO is best exemplified by the ruling on the Tuna-Dolphin dispute between the US and Mexico. The US banned Mexican imports of tuna caught using purse-seine nets on the basis that dolphins were being killed in the process. The GATT panel ruled that it was acceptable for the US to institute specific labeling of tuna imports as “dolphin safe”, it stated that a trade ban discriminated on the way goods are produced, rather than based on the characteristics of the goods themselves.

GATT also ruled that the US could not use unilateral trade bans to force other nations to adopt specific regulatory policies.<sup>7</sup> The Basel Convention clearly seeks to impose policies of Annexure VII countries on all non-Annexure VII countries.

GATT also clearly states through Annexure XI that trade bans are generally not permitted. A country that voluntarily seeks to import or trade in waste for the purposes of recycling or final disposal, with full disclosure of facts during the transaction, will be economically disadvantaged by the trade ban.

Further, the trade ban effected by Basel does not affect Annexure VII countries, which are permitted to trade in hazardous wastes with each other. This is clearly a discriminatory trade practice as defined by the WTO. The WTO states that such trade bans should apply to all countries in a non-discriminating manner.

### **Discriminatory “out” clauses on convention agreements**

The Convention permits (article 4, paragraph 5) individual agreements between members on transboundary transportation of hazardous waste notwithstanding any other bans/agreements that may be effected by the Convention. There are no criteria laid out for such exceptions other than that the transaction must exceed environmental management standards laid out by the convention. The WTO spells out the

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<sup>7</sup> James M Sheehan, “Trashing Free Trade – The Basel Convention’s Impact on International Commerce”, Competitive Enterprise Institute, Environmental Studies Programme, October 1996 ISSN#1085-9047

circumstances under which a signatory country or member may violate the agreement.<sup>8</sup>

*The waiver of the trade ban under special circumstances clearly favour the rich countries, as such trade must be in environmental conditions superior to those spelt out by the Convention. On the other hand, the ban has no teeth with countries that are non-parties to the Convention, notably, the USA.*

This clause is clearly biased in favour of developed countries that are the chief originators of such wastes.<sup>9</sup> They reserve the right to and discretion to enter into agreements with any other country on disposal of the waste. The manner of decision would thus be discretionary as opposed to non-discriminating. This clearly contradicts the Convention’s own objectives of promoting disposal by the polluter country in its own backyard.

**Similarly, the subjective condition of meeting the standards of the Convention clearly favour the developed countries.** Poorer environmental conditions prevail in less developing countries due to economic reasons and realities (discussed later in this paper). Further, in combination with Annexure VII membership discrimination, a minority of members will effectively reserve the rights to determine international standards on environmental standards and use those standards to discriminate on trade.

The above clearly indicates that the Convention’s origins and functioning are in complete conflict and cross-purposes with any democratic multi-lateral forum on trade.

### **Is the Convention working towards its stated objectives**

The Convention when signed in 1989 did not envisage a trade ban. It sought to bring greater transparency and monitoring of data with a view to ensuring proper handling and disposal of waste. This was sought to be enforced through information sharing mechanisms and the system of “Prior Informed Consent”.

The Convention’s database of such trade between 1989 and 1993 clearly tracks the increase in the proportion of hazardous waste destined for recycling across borders from 47% to 59%.<sup>10</sup> This was during the period of “prior informed consent”. The greater availability of waste for recycling has created a market and the technology to improve recovery of products. Developing countries such as China, Korea and India have wide use for such recyclable waste. However, any system of “prior informed consent” still lays itself bare to corrupt and inefficient bureaucracy. In fact, the cases of dumping of wastes in the mid-1980s were largely the result of fraudulent representation of cargoes of hazardous waste that are/could be punishable under fraud and tort laws.

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<sup>8</sup> D B Boralkar and Dilip Biswas, Central Pollution Control Board, Govt of India, “Implications of the Basel Convention in Indian Context”, Presented at the International Conference on Hazardous Waste Management, Anna University, Chennai, India on January 27, 2001

<sup>9</sup> Alan Oxley, Director, International Trade Strategies, Melbourne, “Poor Environment Policy – the fundamental problem in the ‘trade and environment’ debate”, July 22/23, 1999, Columbia Law School

<sup>10</sup> The Basel Convention; Com/env/TD(97)41/Final dated May 28, Report presented to COP IV

However, subsequent amendments in 1995 and 1997 have sought to ban trade in all hazardous waste, including waste heading for recycling.

*Trade bans on hazardous waste will clearly lead to increased primary resource consumption in developing countries like India, that rely on such wastes as inputs to their domestic industry, notably lead and steel in India. Increased primary resource use would work against the Convention's stated objectives.*

The domestic lead industry in India uses up to 50% of its needs through imports of recyclable waste.<sup>11</sup> This proportion is expected to increase during the coming decade. Similarly, shipbreaking contributes about 25%<sup>12</sup> of the input raw materials for the steel industry in India. Both items could potentially be covered by a ban.

The ban on trade of these two commodities will only increase the use of primary resource in India. This will eventually create

a greater pool of waste material that has to be disposed off, given the lack of access to international trade.

**The ban is actually creating a circumstance of greater primary use resource, and larger pool of waste, contrary to its stated objectives.**

### Is the Convention consistent with Free Trade Principles

The economic philosophy behind the functioning of the WTO can be broadly summarized thus:

- Trade contributes to overall economic growth. Hence, the subject of WTO agreements has been to dismantle all barriers to free trade. Tariffs and import duties are to be the only form of regulating trade.
- Free trade promotes efficient use of resources, an environmental objective as well, through competition and pressures on efficiency.
- The WTO works towards a predictable and non-discriminatory trade environment wherein tariffs would be the sole form of regulation. Under the WTO countries are required to not discriminate between other countries when making trade policies, i.e., rules cannot discriminate amongst imports based on origin. Similarly, countries should not discriminate between treatment of imports and domestically made products, i.e., they should be subject to the same regulations and internal taxes. Most importantly, the WTO clearly states that trade regulation should be solely through tariffs and through no other measures.
- The WTO inherently recognizes the needs and realities of developing countries and less developed countries that may need interim measures before they can fully integrate and compete in global markets. A country like India, for example, has under its accession to the WTO reduced its average tariff

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<sup>11</sup> D B Boralkar and Dilip Biswas, Central Pollution Control Board, Govt of India, "Implications of the Basel Convention in Indian Context", Presented at the International Conference on Hazardous Waste Management, Anna University, Chennai, India on January 27, 2001

<sup>12</sup> Industry note from ICICI Ltd, a financial institution

levels on imports from about 76.9% in 1991 to about 35% by the year 1996<sup>13</sup>. This is based on the specific situation of India as a developing country. Tariff levels in developed countries are typically in the range of 5-8%. While working towards a free trade environment, the WTO recognizes that developing countries would need a period of transition.

The Basel Convention on the other hand:

- Is promoting measures such as trade bans rather than greater transparency and accountability in trade (instruments such as “prior informed consent”)
- Inherently contributes to inefficient allocation of resources through the ban by interfering the free play of demand and supply in the market place
- Is discriminatory in several aspects of the measures that it has proposed including in its membership<sup>14</sup>
- Does not incorporate the needs and realities of developing countries as a factor in environmental management
- Is effecting international laws that transcend national laws through minority action.<sup>15</sup>

*The Basel Convention fails to recognize that recovery from waste is an inherent part of poor, developing economies and that economic growth will eventually support good environmental and public health practices. The Convention instead favours measures such as trade bans that will impede economic activity and livelihoods that will work contrary to improvement of environment and public safety.*

The standards under which an industry or economy functions is determined by the prices that can be obtained in the market place.

Garbage recycling in India, viz., segregation of waste and their eventual sale to recyclers have been a long-standing practice that has provided employment to thousands for several decades. The technologies employed in recycling are compatible with price line for such “waste” inputs in the market place. Handling and working circumstances of people in the

trade would not meet developed countries’ standards of “health and environment”. About a decade ago, a DANIDA funded project in India on urban waste recycling using machinery had to be abandoned. The quality of the waste was found unsuitable. This was because all recyclable materials had been removed through the indigenous network of waste collectors.

Similarly, recycling of photographic film has long been an unorganized sector practice in India. There is silver recovery from the photographic film while the recycler makes profits from the plastic recovered from the process. It is a thriving cottage industry in India. In fact, the employment conditions and safety conditions of electricity sector employees handling distribution lines would not qualify under developed country standards on safety and environment. (Maybe a ban on import of

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<sup>13</sup> Source: The World Bank

<sup>14</sup> Alan Oxley, Director, International Trade Strategies, Melbourne, “Poor Environment Policy – the fundamental problem in the ‘trade and environment’ debate”, July 22/23, 1999, Columbia Law School

<sup>15</sup> Alan Oxley, Director, International Trade Strategies, Melbourne, “Poor Environment Policy – the fundamental problem in the ‘trade and environment’ debate”, July 22/23, 1999, Columbia Law School

products manufactured with environmentally unsafe electricity supply might be next on the Basel agenda!)

The smaller waste quantities generated in a developing country like India would not justify machine intensive “safe” technologies in many product categories. For example, the high power committee in India (referred to earlier in this note)<sup>16</sup> found that the environmentally friendly lead smelters would be unviable for the quantities handled by the sector in India.

The availability of large-scale waste eventually permits development of better technologies that are machine intensive, with better labour and environmental conditions. By legislating “developed market” conditions in a “less developed” economy, the outcomes are either that the market goes underground thus offering even less protection for labour or that it dies and significant employment is lost.

A case in point has been the government’s desire to enforce environmentally safe methods of medical waste disposal. The initial attempt was to mandate such disposal methods and technologies for all hospitals and health care centres.

In the Indian context, medical care is a small and medium scale industry<sup>17</sup>. Large hospitals outside of the governmental sector are the exception rather than the norm. Hospitals that have complied with the legislation are operating incinerators or other such equipments at very low capacity utilizations while for the most part, there are no such rules being observed, even three years after a Supreme Court directive on the matter<sup>18</sup>.

Legislation of “standards” in the absence of context or understanding of the market place has so far been ineffective. Further, a move to incentivise environment compliance may be a far more effective measure than “bans”. China’s unique pollution charge on industrial organic water pollution discharge applies to over about half a million industrial units. It has been acknowledged as influential in making polluting units reduce discharges under the system of charge coupled with local community pressure.<sup>19</sup> Perhaps the Annex VII countries could consider a \$ per tonne of steel recovered as an incentive for better compliance on environment and worker safety for ship breakers in India, as opposed to the “ban” method.

The developed countries and industrialized economies have gone through a natural process of evolution that:

- Created scale for production

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<sup>16</sup> Report of the High Powered Committee on Management of Hazardous Wastes, pursuant to writ petition No: 657/95, Supreme Court of India, Research Foundation for Science, Technology and Natural Resource Policy vs Union of India and others, Page 61

<sup>17</sup> Report of the High Powered Committee on Management of Hazardous Wastes, pursuant to writ petition No: 657/95, Supreme Court of India, Research Foundation for Science, Technology and Natural Resource Policy vs Union of India and others, Page 94

<sup>18</sup> Report of the High Powered Committee on Management of Hazardous Wastes, pursuant to writ petition No: 657/95, Supreme Court of India, Research Foundation for Science, Technology and Natural Resource Policy vs Union of India and others, Page 94

<sup>19</sup> Hua Wang, “Pollution Charge, Community Pressure and Abatement Cost : An Analysis of Chinese Industries: Development Research Group, World Bank, January 2000

- Made heavy use of natural resources and products often with dirty technologies
- Through a combination of public nuisance and competitive pressures worked on waste reduction and hazardous waste handling
- As a result of greater prosperity attached higher values to human health and well being to reach its current state of environment well being

The USA is replete with instances of small and unorganized recycling industry functioning in the late 19<sup>th</sup> century and the early 20<sup>th</sup> century prior to any serious laws on environment. Such unorganized industry eventually created industrial “loops”<sup>20</sup> wherein the waste produce or by-products of one industry became inputs for another.

This is best highlighted in the case of animals that were reared and processed for food in 19<sup>th</sup> century America. Animal waste became a disposal issue that eventually gave rise to a variety of products and applications.<sup>21</sup> The animal waste included use of items such as bones, hair, and animal blood. This practice is no different from practices in ancient Europe or the American Indians. In fact, in the mid 19<sup>th</sup> century Britain was an active importer of bones that were used in a variety of products from umbrella tops to knife handles.

Much of this waste recycling has happened due to natural market processes rather than legislated environmental policies.

In the developing country scenario like India, recycling has been a natural way of life preceding any environment law or Basel Convention. Recycling is a small scale and domestic industry for the most part. Most small producers do not have resource to invest in large “environmentally” safe technologies. The few large producers that exist (there are two large lead producers in India that use recycled waste)<sup>22</sup> are unable to compete successfully with the domestic sector in accessing the small and distributed quantities of waste and will now be starved of imports due to the ban. The option will either be a “grey market” import under misrepresented facts, or greater use of primary resource.

As incomes increase and the quality of life improves, there is a natural shift to cleaner technologies. Further, the availability of wastes in scale enables development of technology.

**The Basel Convention fails to recognize that measures that support economic development work towards safer environmental practices. The Convention on the other hand proposes measures that would impede development of poorer countries.**

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<sup>20</sup> Pierre Desrochers, “Eco-Industrial Parks: The Case for Private Planning”, Institute for Policy Studies, John Hopkins University

<sup>21</sup> Pierre Desrochers, “The Secret Past of Resource Recovery”, September 1999, Political Economy Research Centre, USA

<sup>22</sup> D B Boralkar and Dilip Biswas, Central Pollution Control Board, Govt of India, “Implications of the Basel Convention in Indian Context”, Presented at the International Conference on Hazardous Waste Management, Anna University, Chennai, India on January 27, 2001

## **The Basel Convention vis-à-vis sovereign laws of a nation**

The basis of the Basel Convention has been in countries exporting hazardous and toxic waste and dumping it on unsuspecting importers, typically developing countries with weak governments and monitoring mechanisms.

The Convention through its various meetings has recognized the distinction between substances that have further economic value and substances that do not. The heightened consciousness of environmental issues through the past two decades has resulted in several regional and bilateral measures by countries, including developing countries, on trade in such substances.

Developing countries such as India with democratically elected governments and some levels of monitoring institutions can monitor to a fair degree, the usage, movement and handling of hazardous wastes. The legal frameworks and existing laws are by and large acceptable from a domestic viewpoint. As with most developing countries, enforcement is often an issue. However, there are no multi-lateral treaties that are based on bad government. (maybe a ban on imports from countries with bad government as defined by Annex VII countries would be next on Basel’s agenda.)

*The Convention ignores the sovereign right of a nation to import products and commodities that have an economic value for the importing nation.*

The Basel Convention seeks to circumvent the sovereign rights of a developing country to import hazardous substances under regulation as critical inputs to domestic industry. Further, in some cases such as shipbreaking, the key issue appears to be labour conditions in the industry, rather than the fundamentally

hazardous nature of ships imported from breaking. (Mountaineering and saturation diving are also hazardous activities that are not banned in most countries. Ocean going motorless boats are quite the norm for fishing in many developing countries in the world and not “safe” by developed country standards. They do not have life saving equipment or radio, for example. Perhaps a ban on fish trade from small fishing boats could be on Basel’s wish list!)

**A country reserves the right to ban or to import based on its economic needs.**

### **Skewing development of technology**

Developed countries, by virtue of their greater pace of industrialization and stage of economic growth, are the larger producers of waste. Developing countries on the other hand, by virtue of smaller consumption of products, are smaller producers of waste. Waste products typically provide cheaper inputs for production in a variety of industries (cited in the earlier paragraphs).

The development of technologies to increase waste recovery (or for that matter development of technology per se) is linked to the availability of the resource on which the technology is applied. Hence, the concentration of information and

communications technology firms in the USA, or concentration of bamboo products technology in China.

The ban on access to recyclable waste materials under the garb of being hazardous

*By denying poor countries access to industrial wastes, the Convention is reducing their ability to develop appropriate technologies. Such technology may now be developed in “rich” countries, in all likelihood through government subsidized programmes, something that is already happening with ship breaking in the US.*

will restrict access of such waste in developing countries while increasing access in developed countries. Developed countries by virtue of their own environment laws will not be able to export the waste. Domestic environment laws will render recycling an unviable business. For example, the US Govt has a ban on export of ships owned by it for disposal. There are no domestic buyers for the used ships. At present an estimated 180 ships of the US govt<sup>23</sup> are lying around

awaiting disposal. A govt subsidy to third parties in the US for “safe” disposal seems to be the only option out (some gains for the domestic economy especially in times of economic slow down through a discriminatory trade practice).

The prevalence of large quantities of waste that have no competitive value (as they cannot be traded) or domestic value (due to strict environment laws) will create a circumstance of government subsidized development of safe disposal technologies in developed countries. The US Government, in September 1999, approved through Congress, a pilot project of four ships to be “broken” on a “cost plus” basis to shipyards in Baltimore, Brownsville, Philadelphia, and San Francisco<sup>24</sup>. The contracts involved a total fee award for the job of \$13.3 million. This is contrary to the principles of free trade and a clear instance of protectionist policy and government subsidy.

In the long run, developed countries will own “safe disposal” technologies because of such trade interference. Developing countries will yet again have to acquire these technologies from developed countries.

## **In summary**

The Basel Convention seeks to assume a moral high ground on environment and public health based on unilateral measures that are in complete disregard for free market principles, economic realities of developing countries, and that are counter-productive to the objectives of the Convention.

This paper does not argue that:

- hazardous products and wastes should not be regulated
- environment and health are unimportant issues
- countries should not have the freedom to decide whether they would like to trade in a hazardous product or not

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<sup>23</sup> William Langewiesche, “The Shipbreakers”, Atlantic Monthly, August 2000

<sup>24</sup> William Langewiesche, “The Shipbreakers”, Atlantic Monthly, August 2000

This paper argues that the manner in which the Convention has been formed and the way it has functioned in practice is completely undemocratic and in violation of the spirit of any multi-lateral forum.

By effecting unilateral measures determined by a minority of its membership it is setting a dangerous precedent. Lobbying and such methods, long favoured by organized sector in the developing world, could easily influence the views of the minority “empowered” member countries.

*The measures proposed under the Convention will have significant and adverse impacts on many developing economies. These measures are being strengthened under the influence of groups like Greenpeace, who have no direct accountability for their actions, especially to those whose environment and health they ostensibly seek to protect. Such trends of international trade measures under influence of non-accountable groups are dangerous and laying bare the Convention to undesirable influences.*

The current actions of the Basel Convention, as perceived by a developing country like India, **clearly indicate that is possible for groups with no accountability, groups such as Greenpeace, to significantly influence international treaties and laws that significantly affect the economies of the developing and least developed countries.** Such detrimental economic effects will also have detrimental environmental effects and effects on

human well-being in such countries. This is clearly unacceptable.

Further, measures proposed are clearly discriminatory towards poorer countries both in the short run and the long run.

The focus on areas such as shipbreaking in Alang in India is disproportionate to their significance in the larger context of the global environment. Greenpeace, for example, is not accountable for the economic well being or livelihood of the 50,000 workers, nor has it indicated any sense of responsibility on the subject.

More importantly the measures of recourse recommended by the Convention and its supporters are anti-free market, anti-environment and certainly against the interests of India.

The paper favours the use of measures that will, through trade and prices, create the circumstances that promote better environmental compliance and conditions for human safety.

## **Case Study in India**

### **1. Ship breaking<sup>25</sup>**

Shipbreaking in India expanded after the early 1980s. This trend has accompanied the growth of the domestic iron and steel industry as well the availability of surplus ships following the second oil shock in 1979-80. Shipbreaking was recognized as a manufacturing industry in India in 1979. While shipbreaking activities are carried out at various places on the Indian coast, the largest concentration of shipbreakers lie on the West Coast at Alang, Gujarat.

There are about 141 active plots along side a 10 km coast line, and represents possibly the single largest concentration of shipbreaking industry in the world.

The trend in terms of tonnage broken is as under:

<b>Year*</b>	<b>No of ships</b>	<b>Metric Tonnes</b>
1982-83	5	24,716
1993-84	51	259,387
1984-85	42	228,237
1985-86	84	516,602
1986-87	61	395,139
1987-88	38	244,776
1988-89	48	253,991
1989-90	82	451,243
1990-91	86	577,124
1991-92	104	563,568
1992-93	137	942,601
1993-94	175	1,256,077
1994-95	301	2,173,249
1995-96	183	1,252,809
1996-97	348	2,635,830
1997-98	347	2,452,019
1998-99	361	3,037,882

\*Year ending March 31, Indian financial year

Shipbreaking provides direct and indirect employment to about 40,000 to 50,000 people. About 60% of the ships broken are dry cargo ships while wet cargo, tanker and specialized ships constitute the rest.

The primary materials obtained on ship breaking are:

- Recyclable steel (about 2 – 2.5 million tonnes and more per year)

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<sup>25</sup> Sources of data include the Menon Committee Report to the Supreme Court, an industry note on shipbreaking ICICI Ltd (a financial institution), various notes listed in the bibliography

- Engineering and spare parts
- Appliances
- Wood
- Cables
- Lead Acid Batteries
- Oils
- Glass wool and thermocole

The recyclable steel accounts for about 20-25% of inputs to the steel and foundry industry in India, according to estimates made by a financial institution.

### **Economics of operations of shipbreaking**

The price of ship steel is determined by two independent trends:

- Oversupply of ships in different sectors of the global shipping industry. (Oil tankers and general cargo ships were generally in oversupply during the late 1980s onwards, when owners found it more viable to dispose off their ships than operate them).
- Supply of input costs for domestic industry for steel production. Ship steel is a rich source of the steel and costs are related to prices of finished steel and ore as an alternative input.

Broadly, the importers have a gross margin of about US \$ 30 per tonne within which to earn a profit. The industry is not subsidized in any way by the government.

Daily wage earners at these shipbreaking yards earn about US \$ 2 a day or roughly Rs 100 per day. (This qualifies very favourably compared to any semi-skilled daily wage earner in India most of whom are employed in the unorganized or informal sector). This is several times the daily wage of workers in rural agricultural belts such as in Orissa, Andhra Pradesh etc where daily wages, besides being seasonal, are closer to Rs 10-20 day. Consequently, many of the workers come from such interior regions to earn a living at Alang. They are able to send home a part of their earnings to support the families back home.

### **Legal Environment**

The Gujarat Maritime Board has successively enacted laws to protect the rights and safety of workers. These include The Gujarat Maritime Board (Prevention of Fire and Accidents for Safety and Welfare of Workers and Protection of Environment during Shipbreaking activities) Regulations, 2000 in addition to other laws under industrial acts, common law, and environmental legislation including the coastal zone regulations.

Shipbreaking is regulated by the Maritime Board, the state Pollution Control Board and the Coastal Zone Regulation authorities. Activities relating to beaching of ships etc is also regulated by Port Authorities.

Many of the measures of the Gujarat Maritime Board has been in response to a Supreme Court directive in April 2000 requiring that ships should be properly decontaminated before breaking in India.

### **Workers Safety and Environment**

Separate observations of environmental activist organizations including Greenpeace, high powered government committees as well as independent observers generally agree on the following:

- The conditions under which shipbreaking is undertaken at Alang is not safe. Estimates vary, but mortality of one worker per day has been stated in different sources. Official industry estimates place the figure far lower at about 40-50 workers per annum.
- There is environmental degradation at Alang caused by various wastes including hazardous waste substances.

### **The Basel Convention**

The Basel Convention would seek to ban exports of ships for disposal. The USA, not a member of Basel, already has a ban on government owned ships for disposal. Consequently about an estimated 600 ship lie unbroken in government owned waters awaiting disposal. Attempts to complete the ship disposal domestically have found no takers as the activity is uneconomical given domestic US environmental laws.

The Basel Convention, supported actively by Greenpeace and other environmental groups, seeks to place the onus of decontaminating ships for “safe” disposal on owners. Further, such ships should be disposed off within the home country rather than exported.

Ships constructed up to the end of the 1970s used several contaminating substances in particular asbestos. Ships constructed after 1983/84 do not generally have the same handicap. The life of an average ocean going ship is roughly about 20 years. Hence, many of the ships currently being broken date back to the pre-1983 vintage.

### **Implications of the Basel Convention on shipbreaking at Alang**

The Basel Convention initially proposes a ban on export of ships for shipbreaking. The direct impact will be a loss of livelihoods for 40,000 families in the weaker sections of society plus their larger dependant families in their home towns and villages. The ban would be a unilateral non-tariff trade measure.

The Convention and its supporters would like to see international standards of environmental practice for shipbreaking. Such practices, much like the US example, would eventually render the industry unviable.

Without recycled ship steel, an additional amount of ore would be mined for the steel industry on a continuing basis.

Ship breaking would either migrate to other countries with less stringent rules, or continue as a subsidized activity in developed countries. This will eventually lead to a loss of technology gains on recycling steel in countries like India.

The Convention assumes that cost of environmental degradation along the Alang coast is the same the costs in, for example, California. The Convention ignores that are domestic laws enacted that protect worker safety, handling of hazardous substances and their disposal and the environment.

## **2. Lead Acid Batteries<sup>26</sup>**

### **Market Structure**

With greater industrialization and the expansion of the automotive sector, lead consumption in India has risen rapidly through the 1990s. Lead Acid Batteries account for about 75% of the consumption of lead. About half of the estimated consumption of 29,000 tonnes (1996-97 data) was from secondary markets.

The market for primary lead production is dominated by one large producers, viz., Hindustan Zinc Ltd (HZL) with a combined capacity of 65,000 tonnes per annum with plants at Vizag, Andhra Pradesh, and Chanderiya, Rajasthan.

Secondary market capacity is estimated to be about 52,000 tonnes per annum dominated by one large producer, India Lead Ltd with a capacity of 24,000 tonnes per annum. About 15,000 tonnes per annum capacity exists in the unorganized sector with another 25,000 tonnes per annum in the “tiny/backyard” plants. Technology in the unorganized and tiny sector is generally regarded as polluting.

### **Demand estimates**

Estimates made by government agencies on lead supply and demand are as under:

Year	Demand (tpa)	Supply (tpa)
2000-01	105,000	78,500
2006-07	193,000	78,500

The supply refers to organized sector supply. The deficit will have to be supplied by the unorganized sector using recycled lead / lead batteries augmented by imports.

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<sup>26</sup> Sources of information includes the Menon Committee Report, Presentations made by the Central Pollution Control Board at various forums (listed in the bibliography)

### Regulatory framework

In keeping with the Basel Convention and subsequent directives of the courts in India, the government has banned import of certain kinds of lead wastes. However, it agrees that upto 14,000 tonnes of lead are imported annually through various means despite its best efforts.

The government has laid out a code of practice, following its obligations under the Basel Convention, on Environmentally Sound Management of lead acid batteries. These include:

- Registration of User Industry with the Pollution Control Board
- Authorization for management, storage, collection and disposal
- Reports from testing labs as to the compliances with effluent treatment norms etc by the user
- Transportation to the user's sites
- Notification on technology to be followed for lead recovery

### Outcomes of the Basel Ban

The ban on import of used batteries will either result in increased production of primary lead in India and / or increased smuggling / black market for lead.

Lead Acid batteries are collected through a fairly disaggregated system of automotive maintenance stations (a large small sector activity in India). The government's stipulations of end-user authorization for collection will render most of the smaller capacity units being unable to comply with regulations. These will either close down or flourish illegally.

Smaller availability of quantities domestically will discourage development of appropriate scale technology on handling, recycling and disposal of lead / lead waste.

Actions pursuant to the convention will actually harm the environment in the long run through greater use of primary lead plus illegal recycling of lead using "banned technology" in the unorganized sector. This would be contrary to what the Convention seeks to promote, besides interfering the market mechanisms that enable recycling of lead and lead batteries.

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